

proposals to be submitted were to be based on a dollar figure for each ATP to be furnished to each eligible NAP participant per month. The ITB had specific physical facility requirements as well as operational requirements. Since none of these requirements are in dispute with respect to this appeal, they will not be detailed herein.

The ITB was announced in the newspaper three times, on July 16, 23, and 30, 2004. The bid proposals were due by 9:00 am on August 4, 2004 at the Division of Procurement and Supply in Lower Base, Saipan. That day the bids were opened at 9:00 am in the Office of the Director at the Division of Procurement and Supply. Eight (8) people had picked up the specifications for the ITB. At the 9:00 am bid opening, there were nine (9) bids, six (6) of which qualified for the local preference.

The Procurement Preference for Local Businesses was established by Public Law 11-87 and implemented through adoption of Article 7 of the CNMI Procurement Regulations in Vol. 22, No. 8 of the Commonwealth Register, August 18, 2000 at page 17383. Essentially, it recognizes the inherent higher cost of doing business on a small island in the middle of an ocean and gives local businesses a 15% advantage. In other words, if a local bidder submits a bid, quotation, or proposal for capital improvements, public works, goods, or services, it must be chosen over a non-local bid, quotation, or proposal, unless it exceeds the non-local bid, quotation, or proposal by more than 15%.

In order to qualify as a local bidder or proposer, the person, entity, or joint venture must have continuously possessed a valid CNMI Business License and filed and made full payment on all CNMI employment, excise, gross revenue and income tax returns for the three (3) successive years immediately preceding the submission of the bid, quotation or proposal. See CNMI-PR 7-102 (1)(a). A business that wants to be granted local preference must apply for it by submitting a written declaration or affidavit with its bid, quotation, or proposal stating that the business qualifies for the local preference in the particular procurement and specifically stating that it meets the criteria in CNMI-PR 7-102. See CNMI-PR 7-103 (1). The declaration must be signed under penalty of perjury by the proprietor of a sole proprietorship. CNMI-PR 7-103 (1). Failure to submit the application with the bid, quotation, or proposal constitutes a waiver of the right to seek preference, unless the bid, quotation, or proposal is amended prior to the bid opening and the closing time for receipt of bids, quotations, or proposals. CNMI-PR 7-103 (1). No preference may be granted if an application meeting the requirements of CNMI-PR 7-103 (1) is not submitted in accordance with the regulation. CNMI-PR 7-103 (1).

Procurement and Supply has put out a five page “Information Sheet, Procurement Preference for Local Business,” a copy of which was part of the bid package.²

²The actual “Information Sheet, Procurement Preference for Local Business” is four pages that are numbered 1 through 4; the “fifth page” is the Application for Local Preference and it is not numbered.

All of the bids were recorded on the Bid Opening Worksheet dated August 4, 2004 at 9:00 am. The six bids of the bidders who qualified for the local preference were recorded as they had been bid. The other three bids were recorded as bid but then also had their bids adjusted accordingly, i.e., to reflect that they had not received the local preference. There were five (5) spectators and/or bidders at the bid opening on August 4, 2004. Mary Ann Calvo was not there, nor was any official representative of Lawyers' Services.

On September 3, 2004, Ms. Calvo wrote to Herman Sablan, the Director of Procurement and Supply, inquiring as to the final disposition of the bid because "[a]lthough [she] was not in attendance at the opening of this bid due to personal reasons, it is [her] understanding that [she] was the lowest bidder." Mr. Sablan replied via facsimile on September 8, 2004:

In response to your request, please find attached the results of the bidding under this ITB. Note that Lawyers' Services bid was the lowest prior to the local preference adjustment. Following adjustment for lack of local preference qualification, Lawyers' Services bid was ranked 4th lowest.

In order to make a proper claim to be accorded local preference in a procurement you must submit the "Application for Preference" described on page 2 of the four page "Information Sheet" Procurement Preference for Local Business, a copy of which application is attached hereto. The requirement of an application to be submitted is imposed by the CNMI Procurement Regulations (CNMI-PR) Section 7-103(1) *Application for Preference*.

With your bid, you submitted the first page of the "Information Sheet", with the name Lawyers' Services typed at the bottom, a copy of this is also attached. Since there is no possible way that this could be considered the "application for preference" required by the Procurement Regulations, you were not given local preference and your bid price was adjusted accordingly, from \$ 1.98 per ATP, to \$ 2.28 per ATP, for bid comparison purposes.

Immediately upon receiving this letter, also on September 8, 2004, Ms. Calvo responded to Mr. Sablan with a letter of "NOTICE OF PROTEST AND REQUEST FOR ADMINISTRATIVE HEARING RE ITB04-DCCA-0160 'NAP ISSUANCE AGENT'" (hereinafter the "Protest").

By letter dated September 13, 2004, the Director of Procurement and Supply acknowledged Ms. Calvo's protest and denied it, as follows:

This letter will acknowledge receipt of your protest dated September 8, 2004, in which you protest our rejection of your August 4, 2004 claim for local bidders preference on the basis that you did not submit the claim from (sic) required by the CNMI Procurement Regulations, the result of which was your bid was no longer low bid. This letter also denies your protest as untimely filed.

CNMI Procurement Regulations Section 6-101(a) states in pertinent part, that:

*Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of contract may protest to the P&S Director. **The protest shall be received by the P&S Director in writing within ten (10) days after such aggrieved person knows or should have known of the facts giving rise thereto.***

Bids were publicly opened on August 4, 2004. The denial of local bidders preference, and the resultant increase in bid price for bid comparison purposes, for yourself and two other bidders who failed to properly claim local preference, was done at bid opening, and is clearly evident on the bid summary sheet you were provided following your request for a copy of same dated September 3, 2004. Despite your inability to attend the bid opening of August 4, 2004, due to "personal reasons", the bid opening was public and all documents created as part of the opening are public record. You say "it was my understanding that I was low bidder", yet you made no effort to obtain a copy of the official results of the bidding to confirm your "understanding" until 30 days after the opening.

You now wish to protest the denial of local preference which was recorded on August 4, 2004, something you could have and should have known on that day or certainly on the next day thereafter, August 5, 2004. I deny your protest as untimely for the reason that it was not filed within 10 (working) days of August 5, 2004, or by August 19, 2004.

(Emphasis in P&S letter.)

By letter dated September 17, 2004, and received by OPA the same day, Mary Ann D. Calvo filed an appeal of the Director of Procurement and Supply's Decision on her protest of the ITB with OPA. On September 28, 2004, Procurement and Supply filed a "Report on the Appeal of 'Lawyers' Services' from P&S Protest Decision No. 04-011 - Pertaining to ITB04-DCCA-0160 'NAP Issuance Agent,'" which was received by OPA on September 29, 2004.

III. ISSUES RAISED BY APPELLANT

Ms. Calvo's Notice of Appeal sets forth two grounds for appeal:

1. Did the Director of Procurement and Supply improperly find her Protest to be untimely?
2. Did the Director of Procurement and Supply improperly deny her claim for local preference?

IV. ANALYSIS

A. Timeliness

The Director of Procurement and Supply found Ms. Calvo's Protest to be untimely based on the public bid opening on August 4, 2004. Since according to CNMI-PR 6-101(a), the protest should be filed within ten (10) days of when the protestor knew or should have known of the facts giving rise to the protest, the Director determined that she should have filed her protest by August 19, 2004 since the bid opening was public and the adjustments for local preference were made immediately upon opening of the bids and in full public view.

I uphold the Decision of the Director of Procurement and Supply on the issue of timeliness. Bids are opened and recorded at the bid opening, which is a public event, and this record and the bid are open for public inspection. *See* CNMI-PR 3-102(8). After all timely bids are opened and recorded in accordance with CNMI-PR 3-102(8), the Director of Procurement and Supply then prepares a preference-adjusted bid abstract for the purpose of evaluating the bids. *See* CNMI-PR 7-103(2)(a). While CNMI-PR 7-103(2)(a) is not specific about the timing of the Director's local preference adjustment other than it being "after" the bid opening, the usual practice at the Division of Procurement and Supply is that it be done immediately after the bid opening.

There is no dispute that Ms. Calvo did not attend the bid opening. She acknowledged that she was told the next day (August 5, 2004) by someone who did attend the bid opening that she was the lowest bidder. While she did not say whether that person had told her that the bids had been adjusted for local preference or that her bid had been denied the local preference adjustment, those records were available for public inspection. Even knowing

ostensibly that she was the lowest bidder, Ms. Calvo waited a month before contacting the Director of Procurement and Supply.

On September 3, 2004, Ms. Calvo inquired as to the status of her bid. The Director provided her with the information on September 8, 2004. She filed her Protest that same day. The Director's Decision denying the Protest was sent to her on September 13, 2004. She filed her Appeal of the Director's Decision on September 17, 2004. For the reasons stated in the preceding paragraphs, I find Ms. Calvo's Protest to be untimely.

B. Local Preference

Ms. Calvo claims that the "Information Sheet, Procurement Preference for Local Business" that accompanied her bid package was incomplete in that the fifth page, the Application for Local Preference, was missing. In assuming the facts most favorable to the Protestor, I will assume that her package was missing the fifth page. Ms. Calvo submitted the first page of the Local Preference Information Sheets with the name of her company, Lawyers' Services typed on the bottom of the page. She asserts that this is sufficient to qualify for the Local Preference. I uphold the Director's determination that this is insufficient to meet the Local Preference Application or Affidavit requirement.

On page 2 of the "Information Sheet, Procurement Preference for Local Business," there is a section entitled "What is the Procedure for Claiming Preference?":

A business requesting preference must submit a written declaration with its bid, quotation, or proposal stating that it qualifies for preference in a particular procurement and states which criteria it qualifies under. The declaration must be signed under penalty of perjury. Failure to request preference at the time the bid, quotation, or proposal is submitted shall constitute a waiver of the right to seek preference. (See Attached Application for Preference)

Thus, even if the Information Sheet attached to Ms. Calvo's bid package was missing the fifth page, Page 2 makes it abundantly clear that there is an official Application for Preference. Though it is by far the easiest way, the attached Application for Preference is not the only way to qualify for the preference. If in fact Ms. Calvo had submitted an alternate declaration or affidavit that she continuously possessed a valid CNMI Business License and filed and made full payment on all CNMI employment, excise, gross revenue and income tax returns for the three (3) successive years immediately preceding the submission of the bid, quotation or proposal and signed that declaration or affidavit under penalty of perjury, that would have been sufficient. See also CNMI-PR 7-103 Procedure.

To merely take page 1 of the "Information Sheet, Procurement Preference for Local Business," type her company's name on the bottom of it without any declaration that she met the criteria or that it was signed under the penalty of perjury is insufficient to meet the Local

Preference Application or Affidavit requirement. CNMI-PR 7-103 (1) states that “[n]o preference may be granted if an application meeting the requirements of this section is not submitted in accordance with this requirement.” In addition, Ms. Calvo acknowledged that she did have pages one through four of the “Information Sheet, Procurement Preference for Local Business,” which makes it clear on Page 2 that failure to request the preference at the time of the bid, quotation, or proposal waives the right to obtain it.

Moreover, Ms. Calvo is not unfamiliar with the process. Attached to the Procurement and Supply Director’s Report is an Application for Local Preference signed by the appellant on June 10, 2002. Ms. Calvo was cognizant of the method of applying for the local preference and chose not to follow it. I therefore find that the Director of Procurement and Supply properly denied Ms. Calvo’s claim for local preference.

C. Other Issues

In her Protest to Procurement and Supply, Ms. Calvo requested a hearing. In her Appeal to OPA, she asserted that she was denied due process. Neither argument has merit. First, there is no provision for hearings in the CNMI Procurement Regulations at the protest level. Second, Ms. Calvo’s issues regarding timeliness and sufficiency of her request for local preference were easily addressed by the documents in the record. There are no factual ambiguities that could have been or needed to be addressed in a hearing by the Director of Procurement and Supply.

Finally, Ms. Calvo also complains that neither she nor the other bidders have been given notice of the final disposition of the ITB. The contract has not yet been awarded; therefore, in accordance with CNMI-PR 3-102(13)(a) and (b), the unsuccessful bidders have not yet been notified.

DECISION

Based on the foregoing, OPA finds:

1. Ms. Calvo’s Protest regarding ITB04-DCCA-0160 was not timely.
2. In order to qualify as a local bidder or proposer, the CNMI-PR require the person, entity, or joint venture to either submit a signed official Application for Local Preference or submit a declaration signed under penalty of perjury that the bidder, quoter, or proposer, has continuously possessed a valid CNMI Business License and filed and made full payment on all CNMI employment, excise, gross revenue and income tax returns for the three (3) successive years immediately preceding the submission of the bid, quotation or proposal.

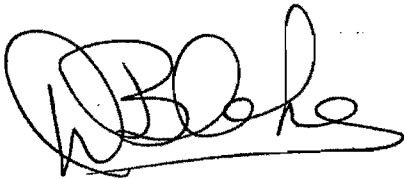
3. Ms. Calvo's submission of the first page of the "Information Sheet, Procurement Preference for Local Business," with the name of her company typed at the bottom is insufficient as an application for local preference.
4. P&S properly did not adjust Ms. Calvo's bid to incorporate local preference.

5. Ms. Calvo was therefore not the lowest bidder for the ITB after adjustments for local preference were made.

The Office of the Public Auditor, therefore, affirms the Decision of the Director of Procurement and Supply to adjust the Lawyers' Services bid because it did not qualify for local preference, thereby placing it as the fourth lowest bid on ITB04-DCCA-0160.

Section 6-102(9) of the CNMI-PR provides that Lawyers' Services, any interested party who submitted comments during consideration of the protest, the Director, or any agency involved in the protest, may request reconsideration of a decision by the Public Auditor. The request must contain a detailed statement of the factual and legal grounds for which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

Such a request must be received by the Public Auditor not later than (ten) 10 days after the basis for reconsideration is known or should have been known, whichever is earlier.



For

Michael S. Sablan, CPA
Public Auditor

November 3, 2004